Petition

81-1539

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NO.

IN THE

Supreme Court of the United States

October Term, 1981

LAWRENCE J. BLOCK,

Petitioner,

versus

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE ~~FORMER FIFTH~~ 11th CIRCUIT

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QUESTIONS PRESENTED

1. WHAT RESTRAINTS ARE IMPOSED UPON GOVERNMENT'S COUNSEL WHEN, ON BEHALF OF THE GOVERNMENT, COUNSEL AGREES TO TAKE NO POSITION AS TO THE SENTENCE TO BE IMPOSED IN EXCHANGE FOR A CITIZEN'S GUILTY PLEA?
2. UPON PROMISING TO TAKE NO POSITION, MAY THE PROSECUTOR RECALL TO THE COURT AGGRAVATING INFORMATION CONCERNING THE DEFENDANT, WHICH IS CONTAINED IN THE PRESENTENCE INVESTIGATION REPORT?

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Petitioner, LAWRENCE J. BLOCK, seeks a writ of certiorari to review the judgement of the United States Court of Appeals for the Former Fifth Circuit entered on November 16, 1981.

OPINION BELOW

The Opinion of the United States Circuit Court of Appeals for the Former Fifth Circuit is unpublished. This opinion, and the Fifth Circuit's denial of Appellant's Petition for Rehearing are reprinted in the attached appendix.

JURISDICTIONAL GROUNDS

This Court's jurisdiction is invoked under 28 U.S.C. §1254(1) as this Petition arises out of a Federal criminal conviction. On November 16, 1981 the former Fifth Circuit Court of Appeals affirmed Petitioner's conviction. Petitioner's Petition for Rehearing was denied by the United States Court of Appeals for the Former Fifth Circuit on December 30, 1981.

CONSTITUTIONAL PROVISIONS INVOLVED

1.The Fifth Amendment to the United States Constitution provides, in pertinent part:

> No person...shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty or property, without due process of law;. . .

2. The Sixth Amendment to the Constitution of the United States provides:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State in the district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense.

STATEMENT OF THE CASE

1. THE INITIATION OF THE CRIMINAL PROSECUTION OF LARRY BLOCK.

Petitioner, LARRY BLOCK, has had serious tax problems for the last ten years. He is the director and principal owner of an aircraft sales and charter company in Atlanta, Georgia. This company began in 1974, evolving from a Honda motor-

cycle dealership to the complicated air charter and sales business it is today. As the complexity and size of Petitioner's airplane business expanded, so also did the complexity and scope of his tax obligations increase. Among his tax responsibilities were Federal Transportation and Use Tax Returns, Federal Corporate Income Tax Returns, Federal Personal Income Tax Returns, Federal Excise Tax Returns, State Corporation Tax Returns, and State Personal Income Tax Returns.

In 1976, Petitioner and his company were investigated and audited by agents of the Internal Revenue Service. In the same year, corporate income tax returns were delinquently filed for the tax years 1972 to 1975. Neither income nor loss was shown on the returns from 1972 through 1974 and the 1975 returns reflected a loss for that year.

Petitioner was not prosecuted criminally for failure to file corporate income tax returns for this period, however he was prosecuted criminally for his failure to file excise tax returns for a period from 1974 through the third quarter of 1976. His company, Planes, Inc., was required to collect, pay over and file returns for excise tax monies due, beginning in October of 1974 when Planes, Inc. went into the air charter business.

2. THE PLEA AGREEMENT.

Petitioner was indicted in February of 1980 in a twenty-four count indictment. Twelve counts reflected charges of failure to pay over excise tax money for twelve successive tax quarters and twelve counts charged misdemeanor offenses for failure to file returns for the same period. The felony counts were dismissed by the District Court Judge who ruled that they were barred by the applicable Statute of Limitations. After lengthy negotiation, and shortly before the scheduled trial of the case, Petitioner and the Government reached a plea agreement regarding the remaining three misdemeanor counts. Petitioner pled guilty to the last three counts in the indictment (covering the most recent three tax quarters of the period charged) in exchange for the Government's promise to dismiss the remaining counts and "to take no position as to the sentence to be imposed". In addition, in the plea agreement, the Government expressly reserved the right to make its files and reports available to the Probation Department to be used in the preparation of the Pre-Sentence Investigation Report.

The plea agreement was signed by the parties and after questioning the Defendant it was accepted by the District Court Judge. Sentencing was postponed until a Pre-Sentence Investigation Report could be completed.

3. THE ABORTED SENTENCE HEARING.

Prior to the sentence hearing Petitioner submitted a sentencing memorandum for the Sentencing Judge's consideration. At the hearing the Judge questioned Petitioner's counsel about an assertion in this memorandum, beginning a string of mistaken statements which permeated the ensuing hearing. A paragraph in the submission stated that the accountants who prepared his corporate income tax returns in 1976 used the general ledgers, rather than invoices and other receipts, to determine income and deductions. The submission stated:

> Consequently, deposits were deemed income and all withdrawals treated as expenses. Thus, the excise tax money that Planes collected was treated as income, for corporate income tax purposes, during these years.

The Sentencing Judge, however, in asking Petitioner's counsel about this excerpt said, "You stated that the company did pay corporate income tax on that money". (R. Vol. III, p. 45.)[1] Although this was never expressed in the submission and indeed no corporate income tax was paid on that money, inasmuch as the returns for those years reflected either zero income or a loss, counsel for Petitioner responded, "Yes". (R. Vol. III, p. 45.) The Court followed with a question as to how much this diminished the excise tax obligation of Petitioner during the period covered by the indictment. (R. Vol. III, p. 45.) Petitioner's counsel again mistakenly responded by saying, "Very modestly". (R. Vol. III, p. 45.) The truth was that no corporate income tax was paid during that period and, consequently, the excise tax obligation was not diminished at all.

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1. References to pages correspond to the record filed on Appeal with the United States Court of Appeals for the Fifth Circuit. The Clerk of that Court has been requested to certify and transmit that record, pursuant to Supreme Court Rule 19.2.

Counsel for Petitioner followed his "Very modestly" remark by saying that the idea of diminishing the excise tax obligation was not his purpose for raising that particular point in the pre-sentence submission. Rather, that point was raised to show the Court that Petitioner had provided the accountants with all the documents at his disposal, including the invoices and receipts which reflected that the excise tax was collected. However, because of record disarray, the accountants chose only to use the general ledgers and therefore did not immediately notice that this money was collected.

This was important, counsel for Petitioner felt, because it showed that Petitioner had provided the accountants with all documents in his possession, thus demonstrating that he was not hiding materials from them or otherwise refusing to cooperate with them. Also, these facts, to some degree, explain why the accountants did not immediately discover the existence and magnitude of Petitioner's excise tax problems.

Shortly after counsel for Petitioner explained his reasons for including this particular portion in the submission on sentencing (and indeed apologized if that excerpt somehow misled the Court into thinking that this accounting error significantly diminished Petitioner's corporate income tax responsibility) (R. Vol. III, p. 49.), counsel for the Government attempted to bring the correct state of affairs to the attention of the Court. The Assistant United States Attorney told the Court that no set-off of corporate income taxes against excises taxes was possible inasmuch as Petitioner's corporate returns for 1972 through 1975 showed losses. (Although only one of the years, 1975 actually showed a loss.) Government's counsel added that Petitioner had not filed corporate income tax returns from 1976 to the present (which was then December, 1980). (R. Vol. III, p. 49.) This latter information, although erroneous, *was also included in the pre-sentence investigation report compiled by the Probation Department and before the Judge at the hearing.*

Government's counsel semi-accurately reflected the state of the facts in regard to the first half of his statement; that corporate income tax returns for the years covered by the indictment showed either no taxable income or, in one year, a loss. However, in regard to the latter half of this statement, the truth was that Petitioner's corporate tax returns for the years following the indictment were all filed in February of 1980.

Shortly thereafter, Government's counsel reiterated his statement that the later returns had not been filed, though specifying, in December of 1980, that his records were "as of March 31, 1980". (R. Vol. III, p. 54.) A short time later, after Petitioner had personally addressed the Court he was asked by the Judge if his corporate income tax returns for the tax years 1976 through 1979 were filed. (It is significant that he was never asked whether his corporation actually paid income tax from 1972 through 1975.) Petitioner told the Judge that they were indeed filed and that they were, in fact, timely filed. (R. Vol. III, p. 54.)

Petitioner's returns were not timely filed; they were delinquently filed in February of 1980. The Sentencing Judge suspended the first Sentence Hearing telling the parties that it would make a difference to her, as to the sentence she would impose, whether Petitioner's corporate income tax returns were filed for the taxable years 1976 through 1979. The Court instructed the Probation Department to supplement its Pre-Sentence Investigation Report with more detailed information vis-a-vis Petitioner's corporate income tax returns.[2] A second sentencing hearing was scheduled.

At the second hearing the Supplemental Pre-Sentence Investigation Report was submitted into evidence over Petitioner's objection. The Probation Department's memorandum showed that the actual facts, concerning the 1976 through 1979 corporate

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2. The original Pre-Sentence Investigation Report, the Supplemental Pre-Sentence Investigation Report and Defendant's Submission on Sentencing are part of the record of this case.

income tax returns, were contrary to Petitioner's statement inasmuch as the returns were not "timely filed". However, it was also clear that the facts were contrary to the Government's position and the original Pre-Sentence Investigation Report that, as of March 31, 1980, the returns had not been filed at all.

Counsel for Petitioner objected to the submission of this memorandum contending that it was the result of the Government's violation of its promise to take no position as to the sentence to be imposed. Petitioner then moved the Court to recuse itself, to seal the record as of a point prior to the first Sentence Hearing, to appoint a new Judge for sentencing purposes and to specifically enforce the plea agreement.

Petitioner's motion was denied whereupon Petitioner was sentenced to serve six (6) months in a "jail-type institution"and to serve two (2) years probation with a special condition of community service.

Petitioner appealed the sentence, alleging that the Assistant United States Attorney had breached his plea agreement to "take no position as to the sentence to be imposed"and requesting that the case be remanded to a new Sentencing Judge with a sealed record and that the plea agreement be specifically enforced. His appeal was denied by the Former Fifth Circuit Court of Appeals who said, inter alia, "[e]fforts by the Government to provide relevant factual information or to correct misstatements are not tantamount to taking a position on the sentence. . .". (A-11.)

REASONS FOR GRANTING THE PETITION

1. IN EXCHANGE FOR PETITIONER'S GUILTY PLEA THE GOVERNMENT PROMISED TO DO NOTHING IN AGGRAVATION OF SENTENCE BEYOND PRESENTING ITS CASE TO THE PROBATION DEPARTMENT FOR IN-

CLUSION IN THE PRE-SENTENCE REPORT; THIS PROMISE WAS BROKEN IN VIOLATION OF THE DICTATES OF THIS COURT IN *SANTOBELLO v. NEW YORK*.

Plea bargaining is a commonplace and accepted practice in the criminal process in both the Federal and State systems. Nevertheless, as Justice Douglas once stated:

> [A] guilty plea is a serious and sobering occasion inasmuch as it constitutes a waiver of the fundamental rights to a jury trial, . . . to confront one accuser's,...to present witnesses in one's defense,...to remain silent,...and to be convicted by proof beyond all reasonable doubt. *Santobello v. New York*, 404 U.S. 257, 264 (1971) (Douglas, J., concurring). (Citations omitted.)

When a citizen waives these critical rights, guaranteed by the Fifth and Sixth Amendments to the Constitution of the United States, in exchange for a promise from the Government, "the most meticulous standards of both promise and performance must be met by prosecutors . . ." *Correale v. United States*, 479 F.2d 944, 947 (1st Cir. 1973). Chief Justice Burger clearly and simply enunciated the obligation of a prosecutor who has bargained for and received a guilty plea.

> [W]hen a plea rests in any significant degree on a promise or agreement of the prosecutor, so that it can be said to be part of the inducement or consideration, such promise must be fulfilled. *Santobello v. New York*, supra., 404 U.S. at 262.

In the instant case, Petitioner entered a guilty plea to three of the twelve misdemeanor counts for which he was charged, in exchange for the Government's promise to withdraw the remaining counts and to "take no position as to the sentence to be imposed". The Government also expressly reserved the right to make its files available to the Probation Department.

This is not the first case in which a court has been asked to determine the meaning and scope of such an agreement. In fact, Petitioner relied upon the meaning of "take no position", given

to it by the Courts, particularly the Third Circuit Court of Appeals, before entering into this particular plea agreement. It would appear that the Government also relied upon the meaning of "'take no position' as set out by the Third Circuit in light of the fact that it expressly reserved in the plea agreement its right to provide its files of the case to the Probation Department for inclusion in the Pre-Sentence Investigation Report.

Petitioner contends that statements made by the Assistant United States Attorney at the Sentence Hearing constituted taking a position and thus violated the terms of the plea agreement. The Court below ruled against Petitioner, stating:

> Efforts by the Government to provide relevant factual information or to correct misstatements are not tantamount to taking a position on the sentence and will not violate the plea agreement. *United States v. Block*, (A-11)..

The issue that aborted the first Sentence Hearing and which became of critical importance to the Judge in determining the sentence (by her own admission) dealt with whether Petitioner had filed his company's corporate income tax returns for the years 1976 through 1979. The subject of corporate income tax returns arose at the sentence hearing in two parts. The first part dealt with the 1972 through 1975 returns. In reference to these returns, the Sentencing Judge mistakenly asserted that Petitioner had said in his sentencing submission that corporate income tax was paid during these years. This mistake was enhanced by the answer of Petitioner's counsel. The Assistant United States Attorney attempted to correct this mistake by telling the Court that "the records of the IRS reflect that the corporate income tax returns for the years 1972 through 1975 showed losses in all of those years. (R. Vol. III, p.49.) This was, in fact, incorrect. The Supplemental Pre-Sentence Investigation Report showed that a taxable loss was reflected only in 1975 and that the other returns showed neither a gain nor a loss.

Prior to the attempted correction by the Assistant United States Attorney, this information, although no doubt part of the Government's files on the case, was not included in the original Pre-Sentence Investigation Report. Petitioner has admitted throughout the Appellate process of this case that a plea agreement such as the one entered into between the Government and MR. BLOCK does not prevent the Government from correcting misleading statements made by either the Defendant or his counsel. It has also been Petitioner's position throughout this process that defense counsel's mistaken assertion was at no point intended to mislead the Court into thinking that Petitioner's excise tax obligation had been significantly diminished. In fact, counsel for Petitioner made it exceedingly clear to the Sentencing Judge that he never intended that to be his point. His point was merely that the accountants computing Defendant's corporate income tax liability (or lack thereof) had complete access to all of Appellant's records but chose not to use them, because of their disarray.

It was not, however, the Assistant United States Attorney's attempt to correct the state of the facts, vis-a-vis the 1972 through 1975 corporate returns, which violated the plea agreement and prejudiced Petitioner. Petitioner has little problem with this attempted correction inasmuch as his explanation for the purpose of raising this accounting technique was not inconsistent with the correct state of facts in this regard. This was clear to the Court (Record Vol. III, 45-46.) and although the issue was discussed later by counsel at the same hearing it was never raised again by the Sentencing Judge.

In fact, the Sentencing Judge suspended the first Sentence Hearing not because she appeared concerned whether Petitioner's returns for 1972 through 1975 reflected losses or "very modest" tax payments but because she was concerned about whether Petitioner's corporate income tax returns for the years 1976 through 1979 had been filed. She stated:

> Gentlemen, I think I will be candid with you. It would make a difference to me in the sentence might impose as to whether or not those tax returns were filed, and I think that is a matter we should be able to find out for sure what the facts are on that, and I believe the appropriate thing to do is to defer imposition of sentence pending your obtaining further information on that question. (A-7.)

This issue, whether the 1976 through 1979 returns had been filed, arose after the prosecutor attempted to correct defense counsel's statements about the preparation of the 1972 through 1975 tax returns. Additionally, the Government's position in regard to these later returns was set out in the original Pre-Sentence Investigation Report which was at the time of the first Sentence Hearing before the Sentencing Judge.

The Fifth Circuit Panel, in its opinion below, stated:

> Even were we to agree with Defendant's curious assertion that no misstatement had occurred, *the Government would still have been obligated to disclose Defendant's failure to file the returns in order to enable the Court to determine an appropriate sentence and would not have violated the plea agreement by doing so.* (A-14.) (Emphasis added.)

This quote is the crux of this case now and was its crux back at the aborted first Sentence Hearing. That is, in light of the Government's agreement "to take no position as to the sentence to be imposed", under the circumstances of this case, is it permissible for the Government to state, incorrectly, that corporate income tax returns for 1976 through 1979 had not been filed as of March 31, 1980 (the hearing being on December 22, 1980); when the Government had included that same incorrect information in its files sent to the Probation Department for the Pre-Sentence Investigation Report and that same incorrect information had been in fact included in the Pre-Sentence Investigation Report and was thus already before the Sentencing Court.

2. THERE PRESENTLY EXISTS A SPLIT BETWEEN THE UNITED STATES CIRCUIT COURTS OF APPEAL AS TO THE PERMISSIBLE LATITUDE OF A PROSECUTOR AT SENTENCING, AFTER THAT PROSECUTOR HAS AGREED TO "TAKE NO POSITION" AT SENTENCING.

In *United States v. Crusco*, 536 F.2d 21 (3rd Cir. 1976), the Third Circuit Court of Appeals discussed at length the oratorical range allowed a prosecutor who has agreed to take no position as to the sentence. In *Crusco*, the defendant changed his plea to guilty to one count of a two count indictment for distribution of heroin in exchange for dismissal of the second count and the prosecutor's agreement to "take no position".

The course of the *Crusco* sentence hearing was virtually identical with the aborted sentence hearing in the present case. In both cases defense counsel made a general plea for leniency citing the defendant's integrity and the needs of their families. In *Crusco*, defense counsel went on to say that the defendant was not a large scale drug dealer nor in any position to deal large quantities of drugs. The Assistant United States Attorney responded that the defendant's position in the organized crime hierarchy was well known to the court, that the facts of the case showed that he had dealt one-half kilo of heroin to an undercover agent and that while out on bail the defendant was arrested and indicted on another conspiracy charge involving a multi-kilo heroin transaction. The defendant objected to these statements, alleging that they were in breach of the Government's promise to "take no position".

On appeal the Government set out three reasons why the prosecutor's assertions at sentencing did not violate the plea agreement. First, the prosecutor included a disclaimer in his statements that the sentence to be imposed was left up to the discretion of the Judge. Second, the prosecutor claimed that "take no position" meant merely that the prosecutor would not speak to the actual terms of the sentence to be imposed. These

two justifications were rejected by the *Crusco* court. In the present case, the Fifth Circuit Panel recognized that the promise to take no position went beyond merely referring to particular terms of a sentence and was in fact indistinguishable from a promise to stand mute at sentencing. (A-8-9.)

Finally, in *Crusco*, the government submitted that it was setting the record straight, in response to defense counsel's misstatements, in regard to the defendant's relative position and involvement in the drug community. The Third Circuit rejected this argument also, stating:

> [I]t does not appear [the defendant's] counsel was making anything more than a paradigmatic argument for leniency in sentence. If there were elements of hyperbole present, it seems that the Government foreclosed any response by its unqualified promise not to take a position on the sentence. *In addition, as the Government itself acknowledged, the court had all the information before it and was capable of forming its own impression without the assistance of the Government. United States v. Crusco, supra.*, 536 F.2d at 25-26. (Emphasis added.)

The dialogue between the Sentencing Judge and Petitioner's counsel regarding whether any corporate income tax was paid for the tax years 1972 through 1975 was even less significant to the case than the "paradigmatic argument" made by defense counsel in *Crusco*. Counsel, although incorrectly stating the facts, explained his point to the Judge (which had precisely the same validity and relevance even if the correct state of the facts were then before the Court). In truth, this point was relatively minor in the whole realm of the Court's sentencing considerations.

The 1976 through 1979 returns raised a new issue which cannot be justified as correcting factual misstatements. The panel below, absolutely ignoring the fact that this very same information was contained in the Pre-Sentence Investigation Report and thus already before the Court (A-7.), increased the Pro-

secutor's latitude far beyond *Crusco* by ruling that at the sentence hearing, despite the agreement to take no position, the Government has the right, and indeed the duty, to provide all relevant factual information (unilaterally determined by the prosecutor).

This rule is not compatible with the *Crusco* rule.

> An unqualified promise of the prosecution not to take a position on sentencing obviously jeopardizes the government's position in the sentencing process and may require the government to remain silent when it should stand up and speak. The government, therefore, must also understand the scope and depth of its commitment and the need for precision in plea bargaining. It may reach port in the plea bargaining process but founder there because of careless or loose language in its commitment. Once it makes a promise, *Santobello* requires strict adherence. *United States v. Crusco, supra.*, 536 F.2d at 26.

Very recently, the United States Court of Appeals for the Seventh Circuit ruled that the prosecutor broke his plea agreement to "make no recommendation whatsoever as to any possible punishment"and to "not offer anything at all in aggravation"by making information contained in his case file available to the probation officer for inclusion in the pre-sentence report to the court. *United States v. Cook*, Case No. 80-2151 (7th Cir., Jan. 7, 1982).[3] This decision also appears incompatible with the the Fifth Circuit's ruling in the present case.

As in the Fifth Circuit Panel's opinion, the District Court in the *Cook* case was concerned with the prosecution's obligation under 18 U.S.C. §3577 to provide all relevant information about the defendant to the court.

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3. The *Cook* case is as of yet unpublished. Quotes contained herein are taken from excerpts of the Opinion in 30 Cr.L.Rptr. 2311 (January 27, 1982). Counsel for Petitioner has sought a full copy of the Opinion but, as of the date of the filing of this Petition, has not received it. Petitioner will supplement this Petition per the requirements of Supreme Court Rule 22.6 when a complete copy of the case is obtained.

> The District Court relied primarily upon its authority under 18 U.S.C. §3577 to consider all information concerning an individual's background, character and conduct in determining an appropriate sentence. The court concluded that the Government was without power to withhold relevant information from the sentencing court and that, therefore, no breach could have occurred. Although we also entertain substantial doubt as to whether the Government could lawfully withhold relevant information from the sentencing court,...if it did in fact promise to do so, then *Cook* is nevertheless entitled to relief....A plea induced by an unfulfillable promise is no less subject to challenge than one induced by a valid promise which the Government simply fails to fulfill. *United States v. Cook*, supra.

In the Court below, the Fifth Circuit Panel stated:

> Federal Courts are required to consider all information concerning a defendant's background, character and conduct when imposing sentence. 18 U.S.C.A. §3577. Accordingly, the prosecutor, as an officer of the court, has a duty to assist the court in effectuating the statutory requirement. Thus, anytime a prosecutor is aware that the court is about to impose sentence based upon incomplete or inaccurate information, the prosecutor has the duty to inform the court of the correct or missing information. (A-12, n.7.)

The above quoted statements of the Seventh Circuit Court of Appeals and the Fifth Circuit Court of Appeals deal with identical subject matter, are critical to the disposition in each case and are absolutely inconsistent. The fact that the Seventh Circuit was interpreting "not offer anything at all in aggravation"and the Fifth Circuit was dealing with 'take no position"is not germane to the issue. The Fifth Circuit Panel indicated that take no position was comparable (if not identical) with a promise to stand mute at sentencing (A-8-9). This can mean no less than the *Cook* promise. The critical factual difference in the cases is, of course, that in the present case the prosecutor ex-

pressly reserved the right to submit his files for inclusion in the Pre-Sentence Investigation Report. In *Cook*, this was not reserved. *See, United States v. Avery*, 621 F.2d 214 (5th Cir. 1980).

In *Cook* the Seventh Circuit ordered that the defendant, be allowed to withdraw its plea, as it was the remedy requested by the defendant and dictum in the case indicates that the Court believed that specific performance "would seem neither practicable nor desirable". This may stem, in part, from the Court's doubt as to whether the Government could lawfully withhold relevant information from the sentencing court. However, the facts in this case show that the information brought out at sentencing which became of critical importance to the Sentencing Judge, whether Petitioner had filed corporate income tax returns for the years 1976 through 1979, was included in the Pre-Sentence Investigation Report and was before the Sentencing Judge at the time of the first Sentence Hearing. Moreover, not only did the prosecutor breach his agreement by offering evidence that would certainly aggravate Petitioner's position at the Sentence Hearing but the prosecutor stated the facts incorrectly putting Petitioner in even a worse light in the eyes of the Sentencing Judge than he would have been had the prosecutor spoke the truth.

As was stated earlier, the initial aborted sentence hearing was replete with factual misstatement. Incorrect assertions about the state of affairs were made by the Judge, defense counsel, counsel for the Government and ultimately by the Defendant himself. Petitioner, however, is the only one who has been held accountable for a misstatement. In response to the Government's assertion that the 1976 through 1979 returns had not been filed, Petitioner said they had been timely filed. Of course, the truth is that they were filed but not filed timely. For this misstatement, Petitioner received six months to serve in prison.

To be consistent with the Third and Seventh Circuits Petitioner should have been allowed to have his plea agreement

specifically enforced. By upholding his sentence the Fifth Circuit has ignored the lesson of *Santobello* and split from the decisions of her sister courts.

CONCLUSION

The promise by the Government which precludes its prosecutor from offering any aggravating information at a sentence hearing comes in many forms: "Take no position"is frequently used. The United States Courts of Appeals are divided as to the restrictions these promises place on a prosecutor at sentence hearings and as to the enforceability of these promises.

The United States Court of Appeals for the Third Circuit, in *Crusco*, has said that these promises are enforceable and indeed must be strictly enforced. The prosecutor may not recall to the Court's attention information already in front of the Court in order to correct what the prosecutor believes is a factual misimpression.

The Seventh Circuit Court of Appeals has said that although these promises *may* be unenforceable, that issue is not dispositive. "The crucial question is not whether the Government had the authority to carry out the promise...but whether it did in fact make such a promise."*United States v. Cook, supra.*

In the present case, the United States Court of Appeals for the Former Fifth Circuit has held that the prosecutor may provide additional information to the Judge at the Sentence hearing (when the prosecutor believes the Court is laboring under a factual misimpression or is without all relevant factual information about the defendant) without breaking his promise to take no position; even when that information is already before the Court in the Pre-Sentence Investigation Report.

These three cases are incompatible. For the reasons stated above, the Court should grant this Petition.

February 12, 1982

Respectfully submitted,

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Appendix

FORMER FIFTH
UNITED STATES v. BLOCK

UNITED STATES of America,
Plaintiff-Appellee,

v.

Lawrence J. BLOCK,
Defendent-Appellant.

No. 81-7061

United States Court of Appeals,
Fifth Circuit.*
Unit B

Nov. 12, 1981

Defendent pleaded guilty in the United States District Court for the Northern District of Georgia, Orinda D. Evans, J., to three counts of willfully failing to file corporate excise tax returns, and he appealed. The Court of Appeals, Frank M. Johnson, Jr., Circuit Judge, held that prosecutor's statements to the effect that defendant had not filed corporate income tax returns and had not paid corporate income taxes merely corrected defendant's misstatements to the effect that corporate income taxes had been paid on the excise tax receipts and had reduced the amount of the excise tax; the prosecutor's statements did not amount to taking a position on defendant's sentence in violation of plea agreement and were not excessive or unjustified.

Affirmed.

1. Criminal Law 273.1(2)

Guilty pleas predicated upon a promise or agreement by the government normally must be fulfilled.

2. Criminal Law 273.1(2)

Where government fails to abide by the terms of a plea agreement, a court has the authority to order specific performance of the agreement.

3. Criminal Law 273.1(2)

Efforts by government to provide relevant factual information or to correct misstatements are not tantamount to taking a position on a sentence and will not violate plea agreement.

4. Criminal Law 700

Prosecutor has a duty to insure that court has complete and accurate information concerning defendant, thereby enabling the court to impose an appropriate sentence.

5. Criminal Law 700

If an attorney for the government is aware that the court lacks certain relevant factual information or that the court is laboring under mistaken premises, the attorney, as prosecutor and officer of the court, has the duty to bring the correct state of affairs to the attention of the court.

6. Criminal Law 986.2(2)

Prosecutor, if permitted by the sentencing judge, may recommend a particular sentence based upon the facts before the court.

7. Criminal Law 273.1(2)

As part of a plea agreement, the government is free to negotiate away any right it may have to recommend a sentence.

8. Criminal Law 273.1(2)

Government does not have the right to make a plea agreement to stand mute in the face of factual inaccuracies or to withhold relevant information from the sentencing court.

9. Criminal Law 986.2(2)

At sentencing hearing on defendant's plea of guilty to three counts of failing to file corporate excise tax returns, prosecutor's

statements to the effect that defendant had not filed corporate income tax returns and had not paid corporate income taxes merely corrected defendant's misstatements to the effect that corporate income taxes had been paid on the excise tax receipts and had reduced the amount of the excise tax; the prosecutor's statements did not amount to taking a position on defendant's sentence in violation of the plea agreement and were not excessive or unjustified. 26 U.S.C.A. §§ 1 et seq., 11, 4261, 4271, 7203.

10. Criminal Law 986.2(2)

At sentencing hearing on defendant's plea of guilty to three counts of failing to file corporate excise tax returns, defendant's misstatements to the effect that corporate income taxes had been paid on the excise tax receipts were not inconsequential, as they indicated that defendant was less culpable, and Govenment had the right to correct such misstatements, notwithstanding plea agreement in which it agreed to take no position on defendant's sentence. 26 U.S.C.A. §§ 1 et seq., 11, 4261, 4271, 7203.

Appeal from the United States District Court for the Northern District of Georgia.

Before VANCE, FRANK M. JOHNSON, Jr., and THOMAS A. CLARK, Circuit Judges.

FRANK M. JOHNSON, Jr., Circuit Judge:

Subsequent to certain negotiations with the government's counsel, defendant Lawrence J. Block pled guilty to three counts of wilfully failing to file corporate excise tax returns, in viola-

tion of 26 U.S.C.A. § 7203[1]. As part of the plea agreement, the Government agreed not to take a position on the sentence to be imposed. Block contends on appeal that the Government took a postion as to the sentence by informing the court that he had not filed corporate income tax returns for a number of years. Block seeks a new sentence hearing, recusal of the sentencing judge and specific performance of the plea agreement. Because we conclude that the statements made by the prosecutor to the sentencing judge did not amount to taking a position on the sentence, we affirm the sentence imposed below.

Block is the principal owner of Planes, Incorporated, a corporation involved in the sale, rental and charter of planes. Because of the nature of the business, the corporation was required to file both quarterly excise tax returns and ordinary corporate income tax returns.[2] In February 1980, Block was indicted on twenty-four counts of violating federal tax statutes. The indictment included three misdemeanor offenses for wilfully failing to file federal excise tax returns. Twelve of the twenty-four counts were ultimately dismissed because the period of limitations had expired. As to the remaining counts, Block and

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1. 26 U.S.C.A. § 7203 states:

   Any person required under this title to pay any estimated tax or tax, or required by this title or by regulations made under authority thereof to make a return (other than a return required under authority of section 6015 or section 6016), keep any records, or supply any information, who willfully fails to pay such estimated tax or tax, make such return, keep such records, or supply such information, at the time or times required by law or regulations, shall, in addition to other penalties provided by law, be guilty of a misdemeanor and, upon conviction thereof, shall be fined not more than $10,000, or imprisoned not more than 1 year, or both, together with the costs of prosecution.

2. Sections 4261 and 4271 of the Internal Revenue Code of 1954 required companies engaged in the transportation of people and property to pay a federal excise tax. Because Planes, Incorporated operated a nationwide charter service, it had to pay the excise tax. In addition to the excise tax, Section 11 of the Internal Rekvenue Code of 1954 required corporations to pay a tax on all taxable income. Thus, Planes, Incorporated had an obligation to file both federal excise tax and federal income tax returns.

the Government negotiated an agreement whereby Block would plead guilty to the three misdemeanor counts relating to the failure to file excise tax returns in return for the Government's dismissing the other nine counts. The Government also agreed not to take a position as to the sentnce to be imposed but specifically reserved the right to provide information to the probation officers for the presentence investigation report (PSI).[3]

The district court accepted the plea and scheduled a sentence hearing. At the hearing, the court had the benefit of both a PSI and a presentence submission prepared by Block. During the course of the hearing, the district judge questioned Block's attorney about a statement in the presentencing submission indicating that the corporation had collected the excise tax, placed it in a general fund and paid corporate income taxes on the amount.

> Q. I have one other specific question for you, [counsel]. I noticed in your submission it was brought out that the funds that were collected for the excise tax by the company were placed in a general fund that was held by the company, and *you stated that the company did pay corporate tax on that money.*

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3. The precise terms of the plea agreement as stated by the Government at the sentence hearing were:

> In return for the defendant [Block] pleading guilty to Counts 22, 23 and 24 of the indictment against him the Government agrees that it will recommend for dismissal to this Court the other nine counts of the indictment.
>
> Further, the Government agrees that it will take no position as to the sentence to be imposed and leave that to your Honor's discretion with the understanding that we can make our files and our reports and whatnot available to the Probation Department for purposes of their investigation.

The Government also acknowledged that it would not appeal the district court's dismissal of the first twelve counts. However, the parties have all agreed that the decision concerning the appeal was not part of the plea agreement.

A. *Yes.*

Q. So, then, my question is looking at the dollars, *how much did that diminish the amount of the excise tax?*

A. *Very modestly.* I mentioned it in passing because I thought it was important that what happened is that the disarray of the tax situation was such that when the accountants came in and they were handed all of the documents they needed, they went through some of the invoices, and I thought that was important that they had access to the invoices, and they realized that the invoice documents were perhaps not complete, and so they took their information from checking account deposits and checks, all of the various things as I understand it. Mr. Player [an accountant] is here, and he again did that, and as a result, the 5 and the 8 percent were included in gross deposits and thus were a portion of the figures which were part of the corporate income tax picture. I mention that only for that purpose, but not to indicate in any way that somehow they had approached a parity of any sort. I didn't intend to do that, I hope I didn't leave that misimpression. (Emphasis supplied.)

Thus Block's attorney informed the court that corporate income taxes had been paid on the excise tax receipts and that the corporate income tax had reduced the amount of excise tax "very modestly." Defendant's attorney followed the colloquy with a general plea for leniency, stating that Block was a fine human being, was a supporter of law enforcement and had done a great deal for the community. The prosecutor did not comment on the general plea for leniency but did take issue with the statement that the corporation had paid income tax on the excise tax receipts.

Your Honor, there was one matter that was stated subsequent to my last speaking about the corporate in-

> come tax returns and their payment. The records of the IRS reflect that the corporate income tax returns for the years 1972 through 1975 showed losses in all of those years. So, no corporate taxes were, in fact, paid. And then no corporate returns have been filed for the years 1976 through 1979. So, this idea that the federal income taxes were paid in some way and the excise taxes were mixed up therein just isn't so since no corporate taxes were paid for the years in question because every year there was a loss reflected on the returns filed.

Until those statements, no mention of the failure to file corporate income tax returns or the failure to pay corporate income taxes had been made either at the sentence hearing or in the PSI. Block contended that the prosecutor's statements were inaccurate. He stated that corporate income tax returns for the years 1976 through 1979 had been filed and had been filed in a timely fashion. The district court made clear that the sentence to be imposed would be influenced by whether the corporate income tax returns had in fact been filed.

> Gentlemen, I think I will be candid with you. It would make a difference to me in the sentence I might impose as to whether or not those tax returns were filed, and I think that is a matter we should be able to find out for sure what the facts are on that, and I believe the appropriate thing to do is to defer imposition of sentence pending our obtaining further information on that question.

The court scheduled a new sentence hearing and instructed the probation office to ascertain whether the corporate income tax returns had been filed.

At the second sentence hearing, an amendment to the PSI was admitted into evidence over Block's objection. The report

indicated that the corporate income tax returns had been filed for the years 1976 through 1979 but that the returns had been filed in February 1980 and were therefore not timely. Further, because the returns showed losses for each year, Block did not actually pay any corporate income tax. Counsel for defendant admitted that the information was true. Thus, contrary to the Government's assertions, the returns had been filed. However, contrary to the assertions of defendant and his counsel, no corporate income taxes had been paid and no corporate income tax returns had been timely filed. Block objected to the report and argued that by raising the issue of the coporate income tax returns the Government had taken a position on the sentence in violation of the plea agreement. Defendant moved (1) for recusal of the trial judge; (2) to have the record sealed; (3) to have a new sentencing judge appointed; (4) to have the original PSI reinstated without the addendum concerning the corporate income tax returns; and (5) to have the plea agreement specifically enforced. The trial judge denied all of the motions and imposed a sentence of six months' incarceration and two years probation.

[1, 2] A guilty plea predicated upon a promise or agreement by the Government normally must be fulfilled. *United States v. Shanahan,* 574 F.2d 1228 (5th Cir. 1978); *United States v. Grandinetti,* 564, F.2d 723 (5th Cir. 1977). Where the Government fails to abide by the terms of a plea agreement, a court has the authority to order specific performance of the agreement. *Santobello v. New York,* 404 U.S. 257, 92 S.Ct. 495, 30 L.Ed.2d 427 (1972); *Petition of Geisser,* 554, F.2d 698, 706 (5th Cir. 1977). We turn now to determine whether the Government violated its promise not to take a position on the sentence by informing the court of defendant's failure to file corporate income tax returns.

A number of cases have concluded that an agreement not to take a position on the sentence or an agreement to stand mute

at the sentence hearing prohibits the Government from attempting to influence the sentencing judge. In *United States v. Avery*, 589 F.2d 906 (5th Cir. 1979), the Government agreed to make no recommendation and stand mute at the sentence hearing. Despite the agreement, the prosecutor and the government's investigating agent provided the probation officer with disparaging information about the defendant that later appeared in the PSI. The prosecutor and investigating agent stated that:

> [the Defendant] was not simply an innocent girl that was wrongly influenced by her boyfriend . . . but rather a smart, manipulative woman that's been involved in numerous past illegal activities . . . [the Defendant is] presently a fugitive from Massachusetts, a chronic liar and ex-drug addict . . . . [T]he Defendant was not a novice in terms of criminal involvement;

Id. at 907. The Court concluded that a promise to stand mute and make no recommendation "means at the least that the prosecutor will say nothing to the judge that would influence the sentencing decision." *Id.* at 908. Had the statements in the PSI been made at the sentence hearing, the Court acknowledged that the agreement to stand mute would have been violated. The case was remanded, however, for a determination as to whether the promise to stand mute barred the Government from providing the probation officer with detrimental information concerning the defendant.[4]

In *United States v. Crusco*, 536 F.2d 21 (3d Cir. 1976), the Government agreed not to take a position as to the sentence

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4. On remand, the district court concluded that the promise to stand mute did not prohibit the Government from providing the probation department with information on the defendant's background and character. 473 F.Supp. 980 (S.D.Fla.1980). The decision was affirmed on appeal. 621 F.2d 214 (5th Cir. 1980).

in return for the defendant's pleading guilty to one count of a drug related offense. At the sentence hearing, counsel for the defendant made a "paradigmatic argument for lenience in sentence," citing as grounds for a reduced sentence the defendant's family situation, his integrity and honor and the fact that he was not a "heavy weight . . . in a position to deal in large quantities of drugs." *Id.* at 25. The prosecutor challenged the statements by noting that the defendant was involved in organized crime and was a danger to the community. The Third Circuit determined that a promise not to take a position precluded the Government from attempting to influence the severity of the sentence. By responding to the defendant's "hyperbole" with information already known to the court, the court concluded that the prosecutor had in fact attempted to influence the severity of the sentence. "Only a stubbornly literal mind would refuse to regard the Government's commentary as communicating a position on sentencing." *Id.* at 26. The case was remanded with instructions to permit the defendant to withdraw the guilty plea.[5]

[3] *Avery* and *Crusco* both affirm that an agreement to stand mute or to take no position on the sentence restricts the Government's right to make certain types of statements to the court. However, neither case stands for the broad position that by making such agreements the Government forfeits all right to participate in either the presentence investigation or the sentence hearing. Instead the cases simply hold that an agreement to stand mute or take no position prohibits the Government from attempting to influence the sentence by presenting the court with

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5. In a subsequent case, the Third Circuit held that an agreement to make no *recommendation* as to the sentence prohibits the Government from suggesting to the court a specific sentence. However, unlike an agreement not to take a position, the Government retained the right to influence the severity of the sentence. *United States v. Miller*, 565 F.2d 1273 (3d Cir. 1977), *cert. denied*, 436 U.S. 959, 98 S.Ct. 3076, 57 L.Ed.2d 1125 (1978). We express no position on this distinction.

conjecture, opinion, or disparaging information already in the court's possession. Efforts by the Government to provide relevant factual information or to correct misstatements are not tantamount to taking a position on the sentence and will not violate the plea agreement. *See United States v. Johnson,* 582 F.2d 335 (5th Cir.), *cert. denied,* 439 U.S. 1051, 99 S.Ct. 732, 58 L.Ed.2d 711 (1978) (agreement not to make a recommendation as to the sentence not violated when Government corrected defendant's misstatements concerning availability of psychiatric care); *United States v. Garcia,* 544 F.2d 681 (3d Cir. 1976) (agreement to take no position on the sentence not violated where Government provided factual information in response to a question from the court.)

[4-8] A prosecutor has a duty to insure that the court has complete and accurate information ocncerning the defendant, thereby enabling the court to impose an appropriate sentence.[6] Thus if an attorney for the Government is aware that the court lacks certain relevant factual information or that the court is

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6. For example, the ABA Standards for Criminal Justice § 3-6.2 (1980) states:

> (a) The prosecutor should assist the court in basing its sentence on complete and accurate information for use in the presentence report. The prosecutor should disclose to the court any information in the prosecutor's files relevant to the sentence. If incompleteness or inaccuracies in the presentence report comes to the prosecutor's attention, the prosecutor should take steps to present the complete and correct information to the court and to defense counsel.
>
> (b) The prosecutor should disclose to the defense and to the court at or prior to the sentencing proceeding all information in the prosecutor's files which is relevant to the sentencing issue.

The Comment to the section provides a poignant explanation of the prosecutor's important role at sentencing.

> One of the most important contributions the prosecutor can make in the sentencing process is to see that the information that the prosecutor has gathered for use at trial is brought to bear on the issue of sentence to the extent relevant, whether that information is favorable or unfavorable to the convicted defendant. Unless the sentencing judge directs otherwise, the prosecutor should forward relevant information to the officer responsible for preparation of the presentence report. It is also desirable that the prosecutor have access to the report, or a summary, after it is prepared in order to check on its completeness and accuracy in light of the prosecutor's information.

laboring under mistaken premises, the attorney, as a prosecutor and officer of the cour, *see Smith V. United States,* 375 F.2d 243, 247 (5th Cir.), *cert. denied,* 389 U.S. 841, 88 S.Ct. 76, 19 L.Ed.2d 106 (1967); *United States v. Cox,* 342 F.2d 167, 171 (5th Cir.), *cert. denied,* 381 U.S. 935, 85 S.Ct. 1767, 14 L.Ed.2d 700 (1965), has the duty to bring the correct state of affairs to the attention of the court.[7] Quite aside from that duty, a prosecutor, if permitted by the sentencing judge, may recommend a particular sentence based upon the facts before the court.[8] As part of a plea agreement, the Government is free to negotiate away any right it may have to recommend a sentence.[9] However, the Government does not have a right to make an agreement to stand mute in the face of factual inaccuracies or to withhold relevant factual information from the court. Such an agreement

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7. Federal courts are required to consider all information concerning a defendant's background, character and conduct when imposing a sentence. 18 U.S.C.A. § 3577. Accordingly, the prosecutor, as an officer of the court, has a duty to assist the court in effectuating this statutory requirement. Thus, any time a prosecutor is aware that the court is about to impose sentence based upon imcomplete or inaccurate information, the prosecutor has the duty to inform the court of the correct or missing information.

8. *E.G.,* ABA Standards for Criminal Justice § 3-6.1 (1980) states in relevant part:

> (b) Where sentence is fixed by the court without jury participation, the prosecutor should be afforded the opportunity to address the court at sentencing and to offer a sentencing recommendation. When requested by the court to furnish a sentencing recommendation, the prosecutor should have the obligation to do so.

9. *E.g.,* ABA Standards for Criminal Justice § 14-3.1 (1980) states in relevant part:

> (b) The prosecuting attorney, in reaching a plea agreement, may agree to one or more of the following, as dictated by the circumstances of the individual case:
>
> (i) to make or not to oppose favorable recommendations as to the sentence which sould be imposed if the defendant enters a plea of guilty or nolo contendere.;

See also Santobello v. New York, supra, 404 U.S. 257, 92 S.Ct. 495, 30 L.Ed. 2d 427.

not only violates a prosecutor's duty to the court but would result in sentences based upon incomplete facts or factual inaccuracies, a notion that is simply abhorrent to our legal system.[10]

We recognize that plea bargaining, for better or worse, is an intergral and indispensable part of our legal system. However, we are equally cognizant that there are limits to what the Government can promise in return for a guilty plea. The practice of agreeing to stand mute in the face of misstatements or of agreeing to withhold relevant factual information from the court exceeds those limits. We concemn such a practice and now place the Government on notice that under no circumstances will such an agreement be tolerated by this Court.

[9, 10] Turning to the facts of the instant case, the Government agreed not to take a position on the sentence. As the previous discussion indicates, the agreement does not normally bar the Government either from providing the court with relevant factual information or from correcting misstatements. Further, Block admits on brief that the agreement simply prohibits the Government from taking its otherwise normal adversary position at sentencing, but does not prevent the Government from correcting false statements made by defendant or defendant's counsel. At the sentence hearing, Block's attorney was asked by the sentencing judge whether the excise tax receipts had been included in the corporation's gross income and corporate income taxes paid on the amount. After receiving an affirmative response, the district judge asked how much the corporate income taxes reduced the excise tax. Counsel for defendant informed the court that the income tax reduced the excise tax "very modestly." Subsequently, defendant stated that cor-

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10. Sentences based upon erroneous information violate due process. *United States v. Espinoza*, 481 F.2d 553, 555 (5th Cir. 1973). *See also United States v. Vasquez*, 638 F.2d 507 (2nd Cir. 1980) ("A sentence within the statutory maximum is reviewable if the possibility exists that it was based on . . . false information.")

porate income tax returns had been filed and that the returns were timely. The truth, however, was that the corporation never paid any corporate income tax. Thus corporate income taxes did not reduce the amount of the excise tax even "modestly." Moreover, contrary to defendant's testimony, the returns were not filed in a timely fashion. The corporate returns for the years 1976 through 1979 were not filed until February 1980. By informing the court that the returns had not been filed and that no taxes had been paid, the Government was simply correcting the misstatements and not taking a position on the sentence. Even were we to agree with defendant's curious assertion that no misstatement had occurred,[11] the Government would still have been obligated to disclose defendant's failure to file the returns in order to enable the court to determine an appropriate sentence and would not have violated the plea agreement by doing so.

Defendant argues that since the misstatement involved an inconsequential fact the Government's response was not justified. Our reading of the record demonstrates that the Government's statements were nothing more than a cogent rebuttal of the contention that corporate income taxes had been paid, thereby reducing the excise tax receipts. The Government did not utter invectives or give opinions. The prosecutor simply made clear that corporate income taxes had not been paid. Thus we con-

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11. In a somewhat astonishing *tour de fource,* defendant attempts to strengthen his argument by contending that no misstatement occurred until after the Government injected the issue of the corporate income tax returns into the sentence hearing. Block states that the absence of a misstatement can be objectively shown by the lack of confusion on the part of the court and the failure of the prosecutor to refer to the misstatement when discussing the corporate tax returns. The argument is frivolous. We simply note that a plain reading of the record affords only one interpretation: that, prior to any statements made by the Government concerning the corporate income tax returns, counsel for defendant misstated that corporate income taxes had been paid and that the taxes had modestly reduced the amount of the excise tax receipts.

clude that the statements were not excessive or unjustified. Further, we are unable to agree with the assessment that the defendant's misstatements were inconsequential. The misstatements indicated that Block was less culpable for failing to pay the excise tax because he had been including the excise tax receipts in gross income and paying federal income taxes on the amount. The Government had the right to dispel this missimpression.

Because the Government did not violate the agreement not to take a position on the sentence when it corrected factual misstatements concerning defendant's payment of corporate income taxes, the decision of the lower court is in all respects

AFFIRMED.

United States Court of Appeals

For the Fifth Circuit

October Term, 19

No. 81-7061

D.C. Docket No. CR-80-00039-01

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

LAWRENCE J. BLOCK,

Defendant-Appellant.

Appeal from the United States District Court for the Northern District of Georgia

Before VANCE, FRANK M. JOHNSON, JR., and THOMAS A. CLARK, Circuit Judges.

JUDGEMENT

This cause came on to be heard on the transcript of the record from the United States District Court for the Northern District fo georgia, and was argued by counsel;

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the order of the District Court appealed from, in this cause be, and the same is hereby, affirmed.

November 16, 1981

ISSUED AS MANDATE:

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*Former Fifth Circuit case, Section 9 (1) of Public Law 96-452-October 14, 1980.

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT*
UNIT B

No. 81-7061

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

LAWRENCE J. BLOCK,

Defendant-Appellant.

Appeal from the United States District Court for the Northern District of Georgia

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ON PETITION FOR REHEARING

(December 30, 1981)

Before VANCE, FRANK M. JOHNSON, JR., and THOMAS A. CLARK, Circuit Judges

PER CURIAM:

IT IS ORDERED that the petition for rehearing filed in the above entitled and numbered cause be and the same is hereby denied.

ENTERED FOR THE COURT:

FRANK M. JOHNSON, JR.
United States Circuit Judge

*Former Fifth Circuit Case; (Section 9(1) of Public Law 96-452-October 14, 1980)